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State Water Resources Control Board
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**SOUTH DELTA WATER AGENCY'S WRITTEN COMMENTS TO THE
STATE WATER RESOURCES CONTROL BOARD
WATER QUALITY CONTROL PLAN
FOR THE SAN FRANCISCO BAY/
SACRAMENTO-SAN JOAQUIN DELTA ESTUARY
AND ENVIRONMENTAL REPORT**

The South Delta Water Agency submits the following written comments to the draft Water Quality Control Plan ("Plan") proposed for adoption by the Board. SDWA recognizes the magnitude and difficulty in addressing the relevant problems and hopes that the Agency's input can assist the Board in carrying out its statutory duties.

1. RIPARIAN AND APPROPRIATORS OF THE SAN JOAQUIN RIVER SYSTEM HAVE BEEN EXCLUDED FROM THE PROCESS OF DEVELOPING THE PLAN.

The recent Framework Agreement and the subsequent Plan were the result of the negotiations between State, Federal, environmental, and water contractor interests. There was no representation in that process by the San Joaquin River system riparians or appropriators upstream of the Delta. In fact, a representative of the CUWA/AG group confirmed that such lack of representation was necessary in order for an agreement to be reached.

This lack of representation becomes even more significant in light of the fact that the Plan does not simply set water quality standards as was traditionally done by the Board, rather it also sets flow standards.

The Plan on page 7 attempts to justify the Board setting its flow standards under the authority of Water Code Section 13050(g) and (h) wherein water quality objectives are defined as levels of water quality constituents or characteristics, or physical properties of water. This reasoning is disingenuous, for if the Legislature had wanted amounts of water as being a part of water quality, it would simply have stated so. On page 7 of the Plan, the Board tries to bolster its argument by stating that the "intent" of the statutes and the legislative history thereof support its conclusion. However, the inability of the Board to give any specific cites supporting its conclusion seems to confirm that the interpretation is incorrect. The Plan does not refer to any standards that may be required under the Public Trust Doctrine, which itself would require a balancing of that and other needs, which as we shall set forth herein has not been done in the Plan.

Normally, the Plan would set water quality standards only, and then it would be the responsibility of DWR in its ongoing capacity as the regulator of water rights to decide what amounts of water (i.e., flows) are necessary to satisfy the demands on the system, what are the priority of the demands, and what junior rights must give.

By setting the flow standards in the Plan and excluding interests such as the SDWA from the process, the Board has done an end-run and prevented those who will ultimately pay for the flows from arguing and presenting evidence as to what those flows should be.

The confirmation of this unfortunate circumstance is that only one public hearing was held on the Plan. Apparently, not one issue raised at the February 23 hearing by the excluded interests had any merit since the Board does not contemplate making any changes to the Plan pursuant to that hearing. In short, interests such as the SDWA had a one-shot at giving input but were faced with a done deal. Water Code Sections 13170 and 13244 requires that the Board hold public hearings before adopting a plan. This certainly presupposes that the Board will consider the input at those hearings.

Again, the Board has apparently concluded that not one issue raised by the San Joaquin River system riparians and appropriators was valid and hence required any change to the Plan. A reasonable request for a change to the Plan was set forth by SDWA. This change would have clarified that the fish flow objectives would not be implemented to the degree they would prevent meeting the salinity standards and other superior in-stream uses.

2. THE PLAN FAILS TO CARRY OUT THE BOARD'S OBLIGATIONS UNDER RELEVANT STATUTES.

When the Board adopts a water quality control plan, it is bound to follow the statutory requirements as does a regional board in adopting a plan. Those requirements include establishing:

[S]uch water quality objectives [in the Plan] as in its judgment will insure the reasonable protection of beneficial uses and the prevention of nuisance. [Emphasis added.]

[Water Code § 13241]

Hence, the Board is to examine the various beneficial interests and develop a plan that reasonably protects them. The Board has not done this in this case.

The Plan directs that the water quality objectives (more accurately flows) for fish and wildlife as measured at Vernalis are a maximum of 3,420 csf from February 1 through April 14 and from May 16 through June 30, and 8,620 csf from April 15 through May 15 both in wet years. Applying basic math to these numbers results in a total maximum flow of 1,311,076.8 acre feet of water per year.

[1 csf = 1.98 ac/ft per day

73 days (Feb. - Apr. 14) + 45 days
(May 16 - June) x 3,420 csf x 1.98 = 799,048.8 acre feet

30 days (Apr. 15 - May 15)
x 8620 csf x 1.98 = 512,028.0 acre feet

TOTAL: 1,311,076.8 acre feet]

Although an astonishing figure, this amount in and of itself does not mean that the Board violated its legal duty, because the Board and its Staff has taken the position that the Plan is not to be implemented for three years. Consequently, how those amounts will be provided and who will be impacted is not relevant and must only be examined during the water rights phase (according to Staff).

Unfortunately, this position is contrary to the Plan itself. On page 24 of the Plan, it states: "The USBR shall provide these flows . . . during this three years period." (Emphasis added.) The Plan goes on to say, "These flows are interim and will be re-evaluated as to timing and magnitude, up or down, within the next three years."

In other words, the Board is relying on the USBR to provide these flows now in order for the Board to determine three years

hence if the flows need be adjusted. By this Plan, the Board is allowing the USBR without any input, evaluation, or monitoring to unilaterally decide how to comply with these flow requirements.

The USBR has already stated that it would meet these flows through releases out of New Melones Reservoir and not Friant. As a condition to its permit for New Melones, the USBR continues to be obligated (page 25 of the Plan) to meet D-1422 salinity standards of 500 TDS at Vernalis.

The Board is well aware that the Bureau has been unable to consistently meet this standard using New Melones water even without these new flow requirements. New Melones simply cannot provide the flow objectives, and whatever it does provide will further decrease its ability to meet D-1422 standards. Hence, the Plan insures that meeting the fish flows will necessarily result in there more often being insufficient water to meet the salinity standards. Such a circumstance is a violation of the law for two reasons:

The first is that, assuming the USBR will make a good faith effort to meet these flow requirements, the Board is relinquishing its obligations with regard to water rights. There is no input or oversight as to whose water will be released and when. All water right holders of New Melones water have priority, diversion, time, and area of use restrictions. Does the Board have any idea how these will be impacted or indeed followed by the Bureau? Can the Board legally not address this issue? Clearly not. The Plan directs the USBR to act while the Board refuses to monitor those actions.

Second, since meeting the flow objectives will prevent the USBR from meeting the salinity requirements of D-1422, the Board is violating Water Code Section 12232 which provides that it and any other state agency . . . "shall do nothing in connection with their responsibilities to cause further significant degradation of the quality of water . . ." in the San Joaquin River. Insuring that the Vernalis standard will be met less often is clearly such a degradation.

The surprising part of this is not that the South Delta Water Agency feels it is not getting what it wants or believes it is entitled to, rather it is that the Board has simply not considered the impacts of the Plan and that Staff believes it does not have to.

3. THE BOARD CONTINUES TO FAIL TO ADDRESS THE SALINITY PROBLEMS ON THE SAN JOAQUIN RIVER.

In developing the Plan, the Board is obligated to set forth the implementation of the Plan which shall include a ". . . description of the nature of actions which are necessary to achieve

the objectives . . ." and ". . . a time schedule for the actions to be taken." (Water Code Section 13242.) The Board continues to avoid this mandate as has the Regional Board.

As the Board knows, the Central Valley Regional Water Quality Control Board's plan for the San Joaquin River Basin was adopted approximately one week prior to its hearing on this Plan. This Plan sets forth and that Basin Plan refers to a salinity standard of 0.7 EC from April 1 - April 31 and a 1.0 EC from September 1 - March 31 as measured at Vernalis (Table III - V of 5b Basin Plan and Table 2, page 5 of the Plan). The Basin Plan, rather than setting a standard for salinity and describing how it will be met, merely states the actions it "expects to implement" to address this issue. How the implementations are to occur is similarly unspecific. The Regional Board recommends the State Board take certain actions and makes further recommendations and seeks more studies. There is no description of how the objectives will be met. This is a violation of Section 13242 because it does not set forth what is to be done and when it is to be done.

In the Plan, it states that DWR and USBR have an ongoing responsibility to implement agricultural objectives (consisting of the EC requirements) pursuant to D-1485, and that those entities will continue to implement those objectives (Plan, page 24).

The Plan then goes on to say that it "expects" flow objectives to "contribute" to achieving the salinity objectives (page 25). It is not clear that this is the case because fish flow objectives typically call for far more water than needed for salinity objectives, and because this depletes the availability of water to meet salinity objectives in other months. The other methods for addressing the salinity objectives include implementing the San Joaquin Valley Drainage Program 1990 Management Plan and recommending that the Central Valley Regional Water Quality Control Board continue its various efforts.

Taking the latter first, the State Board and the Regional Board propose to implement their salinity objectives by recommending each other do something. This is truly an "Alice in Wonderland" approach as each purports to comply with Section 13242 by hoping the other will do something.

As to the former (the SJVDP Management Plan), the Board should note that the program manager, Mr. Edgar A. Imhoff, stated in his August 13, 1990, Memo to the Record of Review of that plan: "The SJVDP . . . has not focused on improving river water quality and river flow regiments." (Page 4 therein.) Rather, the Plan focused on what in-area measures can be done to lessen the export of certain heavy metals and toxic salts.

The Board's Plan even makes a recommendation to coordinate discharges with high flows, a provision that the SJVDP examined and did not adopt.

Rather than taking affirmative steps such as limiting when and what levels of salt may be discharged into the river (which is exactly what the Regional and State Board are constituted to accomplish), the Board simply makes recommendations and "expects" the problem to be addressed. Such noncommittal language clearly fails to satisfy the obligations of specifying what actions are necessary and specifying when these actions will occur as required by Water Code Section 13242.

4. THE PLAN CONTAINS OTHER INCONSISTENCIES.

A. On page 12, the Plan acknowledges that "there are no clearly defined threshold conditions which can be used to set objectives for flow and project operations. . . . Therefore, these objectives must be set based upon a subjective determination of the reasonable needs of" all the demands on the estuary. This means that the Board cannot justify how it arrived at its flow objectives. However, there do exist such objective parameters. Under water rights hearings (not under water quality hearings), the Board should decide what are the priorities of fish and wildlife needs, what level are those needs, and what junior rights must therefore give way. By doing what it has done, the Board has avoided a public discussion of how and how much priority fish flows have.

B. Fish and wildlife objectives also include 1,000 cfs during October as measured at Vernalis, with a pulse flow of 28,000 acre feet to "bring flows up to a monthly average of 2,000 cfs." What this is supposed to mean is unclear. If it means that the monthly average for July through January is to be 2,000 cubic feet per second, it then means the system must generate an additional 851,400 acre feet of water per year. The 28,000 acre feet figure only adds an additional 65 cubic feet per second for each month, which does not seem to be significant in helping it to meet a monthly average of 2,000 csf. We assume this October pulse flow is only to meet the October objective and does not apply to the months of July through January. However, this issue should be clarified.

C. On page 24 of the Plan, it is stated that the USBR shall provide the flows to meet the objectives "in accordance with the biological opinion for Delta smelt." It is unclear what this is supposed to mean. The opinion is not cited or provided, but it in fact requires much lower flows than the Plan. What is the USBR actually going to do and what does the Board expect it to do?

D. On page 35 of the Plan, under letter k, the Board recommends a study be conducted to determine the effects of pulse

flows on fish eggs and larva. Does this mean that the October pulse flow of 28,000 acre feet is not supported by any current study?

E. The Environmental Report ("ER") states that it complies with CEQA requirements for analyzing the environmental effects of the proposed actions. It certainly does not examine the effects which will occur during non-fish flow times of the year after the USBR has met the objective flows (and no water may remain for other listed beneficial uses). What are the effects on wildlife and agriculture in such an event? Failing to examine this is again justified by stating the Plan isn't implemented for another three years. In fact, the Plan is implemented this year. If the Board is not examining this issue, does it believe the USBR must before meeting the flow objectives?

F. On page VIII - 4 of the ER, the study acknowledges that if New Melones flows are insufficient, other upstream water is assumed. It defeats the purpose of analyzing environmental impacts if one ignores reality. During the three year "interim" before final water right decisions are made, there is no additional upstream allocation for the objectives and hence no analysis of the environmental effects.

G. On page VII - 11 of the ER, it discusses average annual decreases in New Melones storage and average annual needs for increases in San Joaquin River water in order to comply with the objectives. There appears to be no analysis of the actual operation of the dams and how one year's depletion affects the next year's ability to meet any requirements much less the flow objectives.

H. On page VIII - 9 of the ER, it describes how the flow objectives will result in a failure to meet salinity standards at Vernalis. The report should examine how alterations in the flow objectives may impact this problem unless it is assumed that the fish and wildlife objectives are more important beneficial uses than the agricultural ones. This issue cannot be put off as suggested on page VIII - 50 because the Plan requires the USBR to meet these objectives during the next three years.

I. As part of its analysis of other recommendations, the ER on page X - 7 discusses potential water transfers. However, the discussion fails to recognize that though authorized under various statutes, most such transfers would still require a permit hearing to determine the impacts of the transfer on other water right holders. This becomes very important if the proposed transfer decreases return flows to the waterway which necessarily adversely impacts downstream users of all types. Without examining this issue, the Board appears to be relying on an unlikely event to assist in the meeting of flow objectives. An analysis of the effect on return flows is also needed when water historically

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applied in summer for agriculture is instead released in spring and fall for fish and when those return flows previously provided part of the protection for downstream prior rights and salinity control.

In conclusion, the SDWA believes the Plan as constituted fails to satisfy the statutory directions to the Board. In the Agency's opinion, the eleventh hour deal put together by the State and Feds has produced a plan that simply will not work. When it does not work, the lack of meaningful evaluation done to date will become obvious and numerous anticipated and unanticipated results will face all the parties, not just the Board.

Very truly yours,

By 
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